BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ANNETTE A. MUNOZ	)	
Claimant	)	
VS.	)	
	)	Docket No. 183,437
FRITO-LAY, INC.	)	
Respondent	)	
AND	)	
	)	
SELF INSURED	)	
Insurance Carrier	)	

ORDER

ON the 15th day of February, 1994, the application of the respondent for review by the Workers Compensation Appeals Board of an Order entered by Administrative Law Judge Floyd V. Palmer, dated December 28, 1993, came on before the Appeals Board for oral argument in Topeka, Kansas.

APPEARANCES

Claimant appeared by her attorney, Terry Beck of Topeka, Kansas. Respondent and insurance carrier appeared by their attorney, James C. Wright of Topeka, Kansas. There were no other appearances.

RECORD

The record considered for purposes of this appeal consists of the documents filed of record with the Division of Workers Compensation in this docketed matter, including the transcript of the Preliminary Hearing held on December 28, 1993, before Administrative Law Judge Floyd V. Palmer.

ISSUES

Whether the claimant sustained personal injury by accident arising out of her employment with the respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for purposes of preliminary hearing, the Appeals Board finds as follows:

The claimant has met her burden of proof in establishing that her accidental injury of September 22, 1993, did arise out of her employment.

The facts in this case are not in dispute. Claimant was at the time of her accident a thirty-four year old employee of the respondent where she had worked for the past sixteen and one-half years as a packer. Her job involved putting finished product into boxes whereupon she would then roll them onto a Bushman. She was also responsible for doing what she described as general housekeeping duties in keeping her area clean, including sweeping the floor, dumping product cans, and emptying trash. On September 22, 1993, shortly after arriving at her duty station, claimant proceeded to clean up her area. As she bent down to pick up some trash on the floor, her back went out and she could not raise herself back up. After she eventually got herself straightened up, she reported her injury to her supervisor whereupon she was referred to a physician for treatment.

Respondent does not dispute that the injury occurred, nor that it occurred at work. However, respondent denies that the claimant's accidental injury arose out of her employment. Respondent cites Martin v. U.S.D. No. 233, 5 Kan. App. 2d 298, 615 P.2d 168 (1980) for its position. The Appeals Board finds that the facts in the Martin case are distinguishable from those disclosed by the record herein. In Martin the claimant's injury occurred in the respondent's parking lot as claimant was exiting his vehicle to go to work. There the accident was considered to be a personal risk because the accident was not associated with a risk connected to the employment. Here, claimant was at work, on the clock, performing her regular job duties. A causal connection to her employment is shown to exist.

Claimant admits that she was doing nothing more than bending over to pick up a piece of trash at the time she sustained her injury to her low back. She also relates two prior episodes of similar instances where her low back has gone out on her. Significantly, both of these instances occurred at work while in the employ of the respondent. She relates no instances of back trouble outside the workplace.

Claimant cites Hanna v. Post & Brown Well Service, 199 Kan. 757, 433 P.2d 356 (1967), for the general rule that if a worker's physical structure gives way under the stress of his usual labor, the injury may be classified as an accident within the meaning of the Workers Compensation Act. Further, Gilliland v. Cement, 104 Kan. 771, 180 P.2d 793 provides that an accident arises out of the employment when the required exertion producing the accident is too great for the worker to undertake, regardless of the degree of exertion required or the condition of the worker's health. The fact that the claimant had a pre-existing condition is no defense to a claim for workers compensation benefits. Demars v. Rickel Manufacturing Corporation, 223 Kan. 374, 573 P.2d 1036 (1978). The Kansas Supreme Court has held that all that is required for an accident to arise out of the

employment is for some causal connection to exist between the accidental injury and the employment. Siebert v. Hoch, 199 Kan. 299, 428 P.2d 825 (1967). See also Brenn v. City of St. John, 149 Kan. 416, 87 P.2d 546 (1939).

K.S.A. 44-501(a) states in part:

> "If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act. In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record."

"Whether an accident arises out of and in the course of the workman's employment depends upon the facts peculiar to the particular case." Messenger v. Sage Drilling Co., 9 Kan. App. 2d 435, Syl. ¶ 3, 680 P.2d 556, *rev. denied 235 Kan. 1042* (1984).

An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment. Martin v. U.S.D. No. 233, 5 Kan. App. 2d 298, 615 P.2d 168 (1980); Hensley v. Carl Graham Glass, 226 Kan. 256, 597 P.2d 641 (1979).

The 1993 Legislature added the following language to K.S.A. 44-508(e):

> "An injury shall not be deemed to have been directly caused by the employment where it is shown that the employee suffers disability as a result of the natural aging process or by the normal activities of day-to-day living."

Although the respondent does not raise "personal injury" or "injury" as its defense to this claim, instead relying upon the words "arising out of and in the course of employment" to deny the compensability of this claim, the Appeals Board feels compelled to address the argument that by simply bending over to pick up a piece of litter the claimant may have been engaged in "normal activities of day-to-day living". While such activity is common to everyday life for most active people, particularly those engaged in the workforce, the Appeals Board does not believe that the Legislature intended so broad an application of the phrase. Just as work can be a normal activity of day-to-day living, we do not presume that the Legislature intended to exclude all such activity from the Workers Compensation Act. To conclude otherwise would effectively make the Act itself entirely irrelevant. Instead, the elements of injury, like the elements of an accident, should be construed in a manner designed to effectuate the purpose of the Workers Compensation Act.

We believe the 1993 amendments to K.S.A. 44-508(e) were intended as a codification of the holding in Boeckmann v. Goodyear Tire & Rubber Co., 210 Kan. 733, 504 P.2d 625 (1972) that everyday bodily motions required by a claimant's work that gradually and imperceptibly erode the physical fibers of his structure would not be compensable where it is clear any movement on or off the job would cause the injury. In

Boeckmann the court found that the claimant's condition was not traumatically induced and that no relationship existed between the aggravation and the employment as the claimant's condition was insidious and persistent in that it got worse all the time regardless of what claimant was doing. K.S.A. 44-508(d) provides a definition of "accident" essentially the same as that quoted in Boeckmann but then the statute goes on to provide that "[t]he elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment." Although there is no allegation here that claimant did not suffer "personal injury" by "accident" on the date alleged, the foregoing language contained in K.S.A. 44-508(d) should be considered in conjunction with the new language added by the 1993 Legislature to K.S.A. 44-508(e).

In this case, the claimant was on the job site performing her required job tasks when injured. The injury was directly related to the physical activity required by the job. There is no showing that the injury would have likely occurred even absent the employment or as a result of the natural aging process. The injury was directly related to a particular strain or episode of physical exertion directly related to the employment. The Appeals Board finds that it was the nature, conditions, obligations, and incidents of the employment which led to the claimant's accidental injury and that as such it arose out of the employment.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Preliminary Hearing Order of Administrative Law Judge Floyd V. Palmer dated December 28, 1993, remains in full force and effect.

IT IS SO ORDERED.

Dated this ____ day of April, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

cc: Terry Beck, 1243 S. Topeka Boulevard, Topeka, KS 66612
James C. Wright, 534 S. Kansas, Suite 1400, Topeka, KS 66603-3408
Floyd V. Palmer, Administrative Law Judge
George Gomez, Director